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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1080

JOHN E. RING,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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In the

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October Term, 1964

No. 1098

John E. Ring,

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

I

Reference to Official Reports of Opinions Delivered in the Court Below

The petitioner's reference to the opinions below is correct.

II

Counter-Statement Concerning Jurisdiction

We respectfully submit that the decision of the Appellate Division of the Superior Court of New Jersey involved no

State statute repugnant to the Constitution of the United States; no title, right, privilege, or immunity was specially set up or claimed under the Constitution of the United States, nor did the said Court decide any federal question of substance not heretofore determined by this Court or contrary to the appellate decisions of this Court.

We respectfully submit that the aforesaid decision rests on well settled precedents and therefore, involves no right, privilege or immunity, under the Constitution of the United States, which needs further determination.

Counter-Statement of Facts

On July 5, 1963 at approximately 4:30 P.M. Officer Muldoon of the Lyndhurst Police Department observed the petitioner traveling west on Valleybrook Avenue. Officer Muldoon followed the petitioner for approximately three blocks and in that distsance, clocked him on the patrol car speedometer at approximately forty-eight or forty-nine miles per hours. A summons was issued for traveling at the rate of forty-nine miles per hour in a twenty-five mile speed zone.

On August 29, 1963 at the hearing in the Municipal Court of Lyndhurst, N. J. the Magistrate once again informed petitioner of the charges against him and the original summons and complaint were verified by the complaining officer, Charles Muldoon in open court.

After a trial in the Municipal Court in Lyndhurst, the appellant was found guilty of violating N.J.S. 39:4-98, and a fine of $100.00 in addition to court costs of $5.00 were levied. The Magistrate also directed the Motor Vehicle Director to suspend or revoke the appellant's driving privileges for a period of one year.

The petitioner was given adequate notice of the charges against him—exceeding the twenty-five miles per hour speed limit—on the date of the offense and again at the opening of the original hearing, yet at no time during the trial in Municipal Court did the petitioner contest the fact that the proper speed limit was other than twenty-five miles per hour. In fact, the petitioner in effect affirmed the twenty-five mile limit when despite substantial evidence to the contrary, he stated that at no time was his speed above twenty to twenty-five miles per hour.

An appeal was taken from the Municipal Court on the stenographic record and the matter was submitted to the Bergen County Court on the record and without oral argument. Judge Gordon H. Brown found the appellant guilty as charged and a fine of $100.00 and $5.00 costs of court was imposed. The status of the appellant's driver's license was left to the discretion of the Motor Vehicle Director.

Under the Criminal Practice Rules of New Jersey, all appeals from judgments of conviction in the inferior courts of limited jurisdiction (in this instance the Municipal Court of Lyndhurst) are taken to the County Court of the county in which such inferior court is located (in this instance the Bergen County Court). R.R. 3:10-2. If a stenographic record was made of the proceedings in the municipal Court, the trial of the appeal in the County Court is heard *de novo* on the record, and the hearing consists solely of oral argument R.R. 3:10-11. In the immediate case, the issue which resulted in the reversal of the judgment of conviction was never raised in the Municipal Court. On appeal the respective parties submitted without oral argument and for the first time, the petitioner through the medium of a written brief, raised the argument that since the State of New Jersey never proved the character of the neighborhood in

which the petitioner was allegedly speeding, the twenty-five mile per hour speed limit which the State contended was applicable to the case was never proven. Therefore, since the petitioner was traveling at a lesser speed then the generally applicable fifty miles per hour speed limit, he should have been acquitted.

The County Court rejected this argument on the grounds that since petitioner never raised the issue of which speed limit was applicable and since actual speed was the single matter litigated, a twenty-five mile speed limit was necessarily implied on the posture of the petitioner's case. The Court distinguished *State* v. *Miller*, 58 N. J. Super. 538 (Cty. Ct. 1959), which was the only other case reported wherein a similar issue had been raised.

The Appellate Division of the Superior Court of New Jersey reversed the conviction holding that the State had the burden of proving all the essential elements of the offense charged and proof of the speed limit was one of those essential elements. Because the Appellate Division refused to enter a Judgment of acquittal and permitted the State to retry the petitioner, the petitioner sought and was refused certification to the Supreme Court of New Jersey.

III

Counter-Questions Presented

Does the State have the right to retry a defendant whose conviction has been reversed on appeal because of a lack of sufficient evidence of guilt?

THE ARGUMENT

The double jeopardy clauses of the United States Constitution and the New Jersey Constitution do not prevent a retrial of a defendant who has successfully reversed his conviction on appeal where the grounds of such reversal has been a lack of sufficient evidence of guilt.

For the purpose of this argument, the State accepts the contention of the petitioner as outlined in Point One of his brief to the extent that the double jeopardy provisions of the Fifth Amendment to the United States Constitution is binding upon the State of New Jersey through the Fourteenth Amendment. Indeed, the courts of New Jersey have previously viewed questions of double jeopardy in light of the Fifth Amendment, relying upon the common law maxim that no man is to be placed in jeopardy more than once for the same offense rather than the narrower provision in *Article I, Paragraph 10* of the *New Jersey Constitution* that no person shall, after acquittal, be tried for the same offense, *State* v. *Currie,* 41 N. J. 531, 536 (1964), *State* v. *Williams,* 30 N. J. 105, 122 (1959), *State* v. *Roller,* 29 N. J. 339, 344 (1959). The essential criteria in New Jersey, like that contained in the federal decisions, relate to the protection of an individual from multiple trials and the accompanying harassment and oppression incident to multiple prosecutions for a single wrongdoing. The very case cited by petitioner, *Green* v. *United States,* 355 U. S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957), subscribes to these objectives and therein it is stated at page 189:

> "But whatever the rationalization, this Court has also held that a defendant can be tried a second time for an offense when his prior conviction for that

same offense had been set aside on appeal. *United States* v. *Ball*, 163 U. S. 662, 41 L. Ed. 300, 16 S. Ct. 1192."

Similar holdings have been reached in the cases of *Eubanks* v. *Louisiana*, 356 U. S. 584, 588, 2 L. Ed. 2d 991, 78 S. Ct. 970 (1958); *Forman* v. *United States*, 361 U. S. 416, 4 L. Ed. 2d 412, 80 S. Ct. 481 (1960); *Bryan* v. *United States*, 338 U. S. 552, 94 L. Ed. 335 (1949); *Foster* v. *Kentucky*, 311 F. 2d 212 (6th Cir. 1962) *cert. den.* 368 U. S. 993; *United States* v. *Berry*, 309 F. 2d 311 (7th Cir. 1962) *cert. den.* 372 U. S. 970; *Stroud* v. *United States*, 283 F. 2d 137 (10th Cir. 1960) *cert. den.* 365 U. S. 864; *United States* v. *Maybury*, 274 F. 2d 899 (2nd Cir. 1960); *Gilmore* v. *United States*, 264 F. 2d 44 (5th Cir. 1959). The law in New Jersey is equally well settled, *State* v. *Croland*, 31 N. J. 380 (1960); *State* v. *Sullivan*, 77 N. J. Super. 81 (App. Div. 1962); *State* v. *Lamoreaux*, 20 N. J. Super. 65 (App. Div. 1952); *State* v. *Moffa*, 79 N. J. Super. 425 (App. Div. 1963).

The rationalization referred to by Justice Black in *Green* v. *United States, supra*, was the theory that immunity from double jeopardy is a personal right which may be expressly or impliedly waived. It has been held that by appeal of a conviction or a motion for a new trial, the accused waives his right to claim double jeopardy. *Forman* v. *United States*, 361 U. S. 416, 425 (1960). See, Note, 16 *Rutgers Law Review*, 597, 598 (1962).

Besides "waiver", double jeopardy will not bar a second prosecution by the application of the doctrine of "imperious necessity." Under this doctrine the courts are vested with authority to discharge a jury whenever "the ends of public justice would otherwise be defeated." *United States* v. *Perez*, 22 U. S. (9 Wheat.) 579 (1824); *Gori* v. *United States*, 367 U. S. 364, 368 (1961).

Petitioner seeks to be included within the purview of the authority of *Downum* v. *United States*, 372 U. S. 734 (1963). In that case the trial judge discharged the jury over defendant's objection—before any evidence had been introduced—because the prosecution's key witness was not present. Subsequently, when a second jury was impaneled, defendant pleaded double jeopardy but his plea was overruled and he was found guilty. Justice Douglas, writing the majority's opinion, held that the prosecution should not be permitted to deprive the defendant of a trial before the impaneled jury, and in absence of any "imperious necessity", the defendant was subjected to double jeopardy.

The Court apparently feared the possible abuse by the prosecution if the holding were otherwise. "Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches." 372 U. S. at 736.

It is submitted that this danger was not present in the instant case because the petitioner's conviction was reversed for insufficiency of the evidence, *State* v. *Ring*, 85 N. J. Super. 341, 343 (App. Div. 1964).

The more recent case of *United States v. Tateo*, 377 U. S. 463 (1964) presented the Court with another opportunity to construe the applicability of double jeopardy. There, during defendant's trial, the judge said he would impose a life sentence on a kidnapping count and consecutive sentences on robbery counts if the jury found defendant guilty. Defendant then pleaded guilty to the robbery counts and was sentenced to twenty-two and one-half years in prison. Subsequently, the guilty plea was set aside on the grounds that the plea was improperly coerced. The Government sought to retry the defendant, but the district

court held that a second trial would result in double jeopardy. *United States* v. *Tateo*, 216 F. Supp. 850 (S. D. N. Y. 1963).

On appeal the United States Supreme Court reversed in a six to three decision and held that the Fifth Amendment does not bar a second trial after the prior conviction was reversed on appeal. While defendant never had a chance at acquittal, the Court noted that the decision would be different if there was any indication that the guilty plea had been coerced for fear the jury would acquit. 377 U. S. at 468 n. 3. See, *The Supreme Court, 1963 Term*, 78 *Harv. L. Rev.* 143, 200 (1964).

In view of these cases, defendant has presented an empty claim. By appealing his conviction in the Magistrate's Court, defendant has clearly waived, either expressly or impliedly, his right to claim double jeopardy. In addition the doctrine of "imperious necessity" applies since the ends of public justice would otherwise be defeated. This was the precise holding of the Appellate Division, *State* v. *Ring, supra,* where it was noted at page 343:

> "However, it is a fact, as the County Court pointed out, that defendant though represented by counsel, did not raise the point in the municipal court. It may be that the approach taken by defendant led the State to believe that there was no dispute about the speed limit. In any event had defendant raised the point in the municipal court (as was the case in *State* v. *Miller, supra,* 58 N. J. Super. 538) the question of the speed limit would have been settled there. Since he did not, but reserved it for appeal, the interests of the State outweigh the inconvenience to defendant, and the State should be given the right to a new trial if it desires one. *Board*

of Commissioners v. *Inlander, supra; State* v. *Lamoreaux*, 20 N. J. Super. 65, 76 (App. Div. 1952)."

It is submitted that the law is clearly opposed to petitioner's contention that double jeopardy prevents a new trial in the Municipal Court.

CONCLUSION

The attempt by petitioner to have this matter reviewed by the Supreme Court of the United States should fail because the decision sought to be reviewed was based on well-settled State decisional law which is in accord with the decisions of this Court; and there has been no substantial federal question raised meriting review by this Court. Based upon all these reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

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